Supreme Court, U.S.
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No. 90-6352

In The

Supreme Court of the United States

October Term, 1991

DIANE GRIFFIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

A. The *Stromberg-Yates* Rule Supports Griffin's Position That Objects Legally, Insufficiently Supported By The Evidence In Multiple Object Cases Constitute Grounds For Reversal.

The government in its brief argues that this Court's decisions in *Yates v. United States*, 354 U.S. 298 (1957) and *Stromberg v. California*, 283 U.S. 359 (1931) do not support Griffin's position. The government agrees that decisions such as *Stromberg* and *Yates* have set aside convictions where the jury received incorrect legal instructions as to several alternative bases for conviction which create the possibility that a rational jury might convict the defendant based upon conduct that is not a crime. However, the government states that the principle does not apply when the jury has been properly instructed and the issue is whether the evidence underlying the object is sufficient to support a conviction. Government's Br. at 6.

First, the government ignores the fact that the jury in Griffin's case received, over her objection, incorrect legal instructions. Well prior to submission of jury instructions, i.e., at the time for a motion for judgment of acquittal, the government admitted and the trial court agreed that the evidence was insufficient as a matter of law to support the Drug Enforcement Administration object of the conspiracy count. R. 340 Tr. 2615; J.A. 52. It was, therefore, legally incorrect to instruct the jury that the jury could convict Griffin either by finding guilt on the D.E.A. object or by finding guilt on the I.R.S. object. The jury as a matter of law could not convict Griffin by finding guilt on the D.E.A. object.

The Government's Instruction 20 and Government's Instruction 21 told the jury that the jury could convict by reason of the D.E.A. object. Appellant's Br. at 12 and 13; J.A. 31, 32.

The trial court refused Griffin's instructions, and, despite agreeing that the evidence was insufficient as a matter of law to find Griffin guilty on the basis of the D.E.A. object, gave the jury the instructions that allowed the jury to do just that.

Even the Seventh Circuit commented, "Finally, we do not understand why, once the government admitted it could not link Ms. Griffin to the D.E.A. objective of the conspiracy count, the district court failed to grant a partial judgment of acquittal with respect to that count". J.A. 117. The jury in the instant case received incorrect legal instructions.

Second, the government denies the fact that the instructions in this case created the possibility that a rational jury might have convicted Griffin on conduct that is not a crime. The government's position is that if the D.E.A. object had not stated a crime, was outside the statute of limitations or was unconstitutional, the *Stromberg-Yates* rule would have operated and would have required reversal. The government calls these legal insufficiencies. How would we know with the D.E.A. object being legally insufficient, the government would ask, whether the jury ignored the I.R.S. object, seized upon the D.E.A. object alone and found Griffin guilty on the D.E.A. object? The government says that what it calls factual insufficiency does not pose such a threat. A closer inspection of the case discloses that this position is untenable.

In its prosecution of Griffin the government produced and placed into evidence the fact that Griffin was one of the girlfriends of the drug king pin, Alex Beverly, that she knew and associated with the defendants in the case, that she owned the bar in which numerous drug conversations were had, that she owned the private phones and business phones upon which numerous drug conversations were had, that numerous large drug deals were initiated in the bar that she owned and in which she worked and that they were then consummated in her building next to her bar, that she conversed with the largest wholesale supplier of drugs in the case and that she lived with the drug king pin in the same apartment. However, none of Griffin's conduct amounted to an offense under the law. The volume of evidence concerning her conduct did not under the law allow the possibility that a rational jury could convict Griffin upon the D.E.A. object.

Is not the same question so aptly raised by the *Stromberg* and *Yates* cases that which must be raised in the instant case? How do we know whether the jury completely ignored the

I.R.S. object, seized upon the D.E.A. object alone and found Griffin guilty of Count 20 based on that object precluded by legal insufficiency of evidence, i.e., the conduct under the legal standard did not constitute a crime?

The government's apparent answer is that one knows because the jury would not choose the object that is not sufficiently supported by the evidence. To quote the government, "It would be unreasonable to assume that the jury would choose to reject the sufficiently proved object and rely on the insufficiently proved object instead". Government's Br. at 13. The first problem is the description of the object as the "insufficiently proved object". Such a descriptive term is misleading. The more accurate descriptive term is "the legally, insufficiently proved object". The term "insufficiently proved object" infers that any person could see the insufficiency and would never find guilt on that object. This descriptive term may be accurate when the government submits no evidence concerning an object. It may be accurate when the evidence is negligible in quantity and there is no prejudicial spillover. But it is definitely not an accurate descriptive term when the government produces a large volume of evidence in a prejudicial spillover case such as Griffin's.

The term "legally, insufficiently proved object" or "object legally, insufficiently supported by the evidence" accurately describes the situation for it allows for the very real prospect that a person trained in the requirements of legal sufficiency of evidence would recognize the insufficiency of the evidence, but that untrained lay persons would not. This would be true especially in prejudicial spillover cases such as the instant case.

The government position necessarily must be that a jury would indeed recognize legal, evidentiary insufficiency. The government suggests that this premise is so well grounded in experience that this Court should recognize a presumption that a jury will choose to decide a charge only on the object or objects that are legally, sufficiently supported by the evidence and eschew objects that do not meet the legal standard for sufficiency of the evidence. Government's Br. at 20. Such a presumption should not be indulged.

The government in its brief has not responded to Petitioner's discussion of the role played by motions for judgment notwithstanding the verdict, motions for directed verdict and motions for judgment of acquittal. Obviously it is well known that juries do return verdicts of guilty on charges that do not meet the legal standard for sufficiency of the evidence. These long standing common law and statutory motions address the well known problem that juries find guilt on charges legally, insufficiently supported by the evidence. Juries do not recognize the legal standard. Within the last year the United States Court of Appeals for the Seventh Circuit alone has reversed at least four convictions on drug conspiracy counts because of insufficiency of the evidence.[1]

This Court has perceived the real concern when one of the objects is sufficient and the other is not in *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Sandstrom* there was only one charge. It was agreed that the evidence was sufficient for a jury to convict on the charge. But there were two methods of deliberation by which the jury could have reached guilt. One was through use of a presumption as to criminal intent. The other was by proceeding to deliberate on the sufficient evidence without use of the presumption. The presumption was found by this Court to be invalid. The state argued that the jury could have found the defendant guilty on the evidence rather than by relying upon the presumption and, therefore, the verdict of guilt should be upheld. This Court in a unanimous decision rejected the state's argument:

> But, more significantly, even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do.

Id. at 526. Griffin's position is not any different. The jury in her case could have decided the case on the I.R.S. object but we cannot be certain that this is what they *did* do. The

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[1] *United States v. Townsend*, 924 F. 2d 1385, 1398 (7th Cir. 1991); *United States v. Dennis*, 917 F. 2d 1031, 1033 (7th Cir. 1990); *United States v. Kimmons*, 917 F. 2d 1011, 1016 (7th Cir. 1990); *United States v. Lamon*, 930 F. 2d 1183, 1192 (7th Cir. 1991).

government missed the point in *Sandstrom*, and the government has missed the point here too. The same crucial analysis caused reversal by the Tenth Circuit in *Newman v. United States*, 817 F. 2d 635 (10th Cir. 1987).

Without any fact finder, let alone the jury, weighing any evidence to determine if the evidence proves the defendant guilty beyond a reasonable doubt, the defendant in the government's scenario is found guilty. The defendant is effectively deprived of a jury trial, since only a judge makes the decision; and, the defendant is effectively deprived of his right to be proven guilty beyond a reasonable doubt, since the judge only determines that the evidence is sufficient to prove him guilty looking at the evidence in a light most favorable to the prosecution.

The government says that all of that is acceptable unless the insufficient object consists of failure to state an offense, violation of the statute of limitations or invalidity under the Constitution. Is the possibility that a defendant be convicted by overwhelming evidence on a charge commenced one day past the statute of limitations more odious to our sense of justice and fair play than the possibility that a defendant be convicted on evidence so lacking that the law of this country says that on such evidence no person should ever be convicted? In either scenario the evidence on the remaining object is still legally sufficient for the defendant's conviction if the jury is assumed to have deliberated upon it and agreed that it proves guilt of the defendant beyond a reasonable doubt. It is evident that if *Stromberg* and *Yates* are alive, neither scenario is acceptable. If *Stromberg* and *Yates* are dead, it does not matter because then we have agreed that speculation on the jury's verdict is sufficient.

Did the jury ever reach a decision or even deliberate upon the sufficient object? One does not know. That is the concern raised by *Stromberg* and *Yates*. Having an object insufficiently supported by the evidence no better assures us that the jury ever deliberated and found upon the remaining sufficient object than having objects insufficiently meeting the statute of limitations, insufficiently stating an offense or insufficiently meeting other Constitutional standards.

In Griffin's case we do not know and we shall never know whether the jury found guilt on the object legally, insufficiently supported by the evidence. Griffin seeks a rule of reason, the reasoned rule of *Stromberg* and *Yates* to preclude such a possibility at her re-trial.

B. *Miller v. United States* And *Turner v. United States* Do Not Trump The *Stromberg-Yates* Rule When The Object Is Legally, Insufficiently Supported By The Evidence And One Does Not Know If The Jury Decided Guilt Upon That Object.

The government in its brief posits that *Miller v. United States*, 471 U.S. 130 (1985) stands for the proposition that even if the evidence at trial fails to prove all of the allegations in the indictment (count), the sole question for a court is whether there is sufficient evidence to permit a rational jury to find the Defendant guilty on the count. Government's Br. at 8. *Miller* does not give us that learning.

In *Miller* the government initially alleged in the indictment that the defendant defrauded his insurance company by consenting to a burglary of his own business and by lying to them about the value of his loss. Before trial the government moved to strike the part of the indictment alleging consent to the burglary. The defendant objected to its removal. In other words, it was the government which wanted to remove the consent to burglary issue from the jury's consideration. *Id.* at 813, 814.

In *Miller* the government produced only proof of defendant lying to his insurer. The government produced no proof about his consent to the burglary. If anything, Miller waived the *Stromberg* issue, if he had one. Moreover, a total lack of evidence on the issue of consent to the burglary raised no specter of a jury mistaking volumes of hollow evidence for evidence capable of proving guilt beyond a reasonable doubt. Neither does the opinion report that the prosecutors argued in either opening statements or closing arguments that the defendant was guilty of consenting to the burglary.

In fact, in *Miller*, if anything the government and the judge wanted to narrow the issues before the jury to only one.

Defendant there refused that narrowing in order to preserve the variance and grand jury issues that he thought important. In the instant case Griffin sought to do what the defendant in *Miller* refused to do. She wanted only one object before the jury.

Miller cites *Turner v. United States*, 396 U.S. 398 (1970), but in no way does the *Miller* decision, essentially concerning variance and right to trial on grand jury indictment, have application in the issue raised in this appeal nor does it extend or enhance *Turner*.

Turner itself is not a conspiracy case. It is a multi-act substantive count case. *Miller* does not reach the issue now before this Court, but the government insists that *Miller* and *Turner* together have formulated principles on multi-object conspiracies. The government proffers *Turner* as the cornerstone upon which the entire edifice of multi-object conspiracy charges, multi-predicate act RICO charges and multi-act substantive charges have foundation and consequently must rely. Although a substantial line of cases has developed from the facial rule of *Turner*, *Turner* itself is a case wherein the Court did not have to concern itself with whether a jury may have found guilt on an act that was legally, insufficiently supported by the evidence and may have failed to deliberate on the act that was legally, sufficiently supported by the evidence.

The defendant in *Turner* was charged with purchasing, dispensing and distributing heroin. The record showed that the only evidence concerning an act was evidence of possession of heroin. The Court in *Turner* for reasons explained in the opinion equated a possession of heroin with purchase of heroin, but the Court could not equate possession of heroin with dispensing or distributing heroin. 396 U.S. at 421, 422.

In summary, the only evidence was that of possession of heroin. A verdict of guilty was returned. Possession and possession alone was the equivalent of purchasing. The Court, therefore, absolutely knew that the jury had found guilt on purchasing and not on dispensing and distributing. Since there was no doubt as to the jury's finding, the conviction was affirmed.

In the instant case there is no certitude as there was in *Turner*. Moreover, Griffin, unlike the defendant in the *Turner* case moved up front for a simple set of reasonable instructions to determine upon which object the jury was to find guilt, if either.

The Court in *Turner* decided the case without reference to the *Stromberg* or *Yates* rule. One can see that the Court at the time of its decision in *Turner* need not have made reference to *Stromberg* or *Yates* since the Court in *Turner* knew what the jury found and ruled that that particular finding equated to only one of the alleged three acts.

The cases which have sprung from the *Turner* case have extrapolated the surface words of *Turner* into a theory for handling multi-act charges, multi-predicate act RICO charges and multi-object conspiracy charges. That rule directly contradicts the *Stromberg* and *Yates* rule. Many of the cases that rely on *Turner* do not distinguish between acts or objects that are legally sufficient or factually sufficient.

The Court in *Turner* when citing *Crain v. United States*, 162 U.S. 625 (1896), stated, "The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." The maxim does not condone speculation. The *Crain* case did not go that far either. One proposition that *Crain* did establish is that conjunctively pled acts were to be considered disjunctively pled acts. Originally *Crain* was not an imprimatur for speculation about specific jury findings.

Crain, an antique case, neither discusses the effect of spillover prejudice nor uncertainty over which act was decided upon by the jury. The case in essence revolves around a post verdict challenge to the pleading of "three separate distinct felonies" in one count under the form of a motion in arrest of judgment. 162 U.S. at 634. The Court in *Crain* held that the count did not allege three separate felonies but one felony that could be committed through three separate modes. Basically, the Court said that the count was properly pled and not subject to a motion in arrest of judgment for defective pleading. 162 U.S. 634, 636.

The Court in *Crain* did state that the proper remedy was referred to in *Commonwealth v. Tuck*, 20 Pick 356. The Court said, " . . . that the appropriate remedy of the accused, in order to avoid the inconvenience and danger of having to meet several charges at the same time, is a motion to quash the indictment or to confine the prosecutor to some one of the charges." This is what Griffin attempted. She sought to confine the government to the I.R.S. object in order to avoid the danger of having to meet two charges – one of which was admittedly insufficient – at the same time.

The government claim that *Stromberg* applies to objects insufficient as a matter of law and that *Turner* applies to objects insufficiently supported by the evidence is more of a government wish than a rule. Depending on which result courts have wished to accomplish, courts have applied the rule of *Stromberg-Yates* or the extrapolated rule of *Turner*.

C. The Supreme Court Has Employed The *Stromberg* And *Yates* Rule Both In Cases Having Objects Legally, Insufficiently Supported By The Evidence And In Cases With Objects Insufficient For Statute Of Limitation Reasons, Failure To State An Offense Reasons And Constitutional Reasons.

The government asserts that *Yates*, *Cramer*, *Williams* and *Stromberg* do not explicitly distinguish between legal and factual insufficiency. Government's Br. at 19. More accurately these cases, along with *Haupt v. United States*, 330 U.S. 631 (1947), show that the Supreme Court has employed the *Stromberg-Yates* rule in both cases having objects legally, insufficiently supported by the evidence and in cases having objects insufficient for statute of limitations reasons, failure to state an offense reasons and Constitutional reasons.

The government proves Griffin's point in the citation of *Cramer v. United States*, 325 U.S. 1 (1945). The government states, "The Court questioned whether lying to the F.B.I. under the circumstances could legally constitute treason, but the Court found no need to reach that issue because it reversed on the ground that other charged acts of treason did

not, as a matter of law, constitute treason". Government's Br. at 19. That is absolutely not the basis upon which the Court decided *Cramer*.

In essence, the prosecution in *Cramer* submitted three overt acts to the jury. The Court inspected two of the three overt acts for sufficiency of the evidence. As the Court said, "Whatever the averments might have permitted the government to prove, *we now consider their adequacy on the proof as made*." (Emphasis added). The Court proceeded to discuss the evidence on overt acts one and two for the next eleven pages of the opinion.

Finally, the Court ruled, "We hold that overt acts one and two are insufficient as proved to support the judgment of conviction, which accordingly is reversed." 325 U.S. 48. If it can be said the Court decided *Cramer* on the legal sufficiency, it is because the Court found the evidence as a matter of law insufficient. This is exactly Griffin's point. Insufficient evidence is a matter of law. The critical language of the *Cramer* opinion on the effect of the insufficiency of the evidence on two of the three overt acts is contained in footnote 45 on page 36 of the opinion.

> The verdict in this case was a general one of guilty, *without special findings as to acts on which it rests*. (Emphasis added) Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. *Stromberg v. California*, 283 U.S. 359, 368; *Williams v. North Carolina*, 317 U.S. 287, 292.

325 U.S. at 36. The Court did not hesitate in applying the *Stromberg* rule when two of the three overt acts were insufficiently supported by the evidence. Not one mention is made of a willingness to extrapolate *Crain* as support when in *Cramer* a third overt act may have been sufficiently supported by the evidence.

Two years after *Cramer* this Court reviewed another sufficiency of the evidence multi-overt acts case in *Haupt v. United States*, supra. This Court clearly recognized that the

Stromberg-Cramer rule was the applicable one. In addition, the Court recognized that in its prior *Cramer* decision it had held that reversal was required, " . . . if any of the acts were insufficient or insufficiently proved." 330 U.S. at 641, n. 1. The government attempts to minimize the obvious impact of the Court's deliberate decision to apply the *Stromberg-Cramer* rule. The government argues that it is only *dicta* in a passing footnote. Government Br. at 24. When the Court previously cited the *Stromberg* rule as the law applicable to the resolution of the *Cramer* factual insufficiency case, it also cited the pertinent law in a footnote. Footnote citation in no way diminishes the obvious declaration by the Court that the *Stromberg-Cramer* rule was equally applicable to insufficient evidence situations.

If any case contains *dicta*, it is the *Miller* case which turned not at all on the issue now before this Court but on whether the defendant's right to trial on a grand jury returned indictment was violated and whether the proof at trial caused a fatal variance with the charge.

The Court's decisions in *Cramer* and *Haupt* demonstrate that the Court has considered factual insufficiency not to be any less an obstacle to conviction than legal insufficiency. The Court recognized in *Cramer* and *Haupt* that the jury cannot be expected to discern the legal insufficiency of the evidence any better than other types of legal insufficiency.

D. The Well Accepted Fact That Juries Do Not Discern The Legal Sufficiency Of The Evidence Does Not Affect The Jury's Traditional Discharge Of Its Function.

The acceptance of the fact that juries do not discern the legal insufficiency of the evidence does not affect the jury's traditional discharge of its function. Neither *Richardson v. Marsh*, 481 U.S. 200, 206-207 (1987) nor *Duncan v. Louisiana*, 391 U.S. 145 (1968) justify the government's confidence that juries are able to see as lawyers and judges do that although the prosecution may produce a large volume of

evidence against the defendant in a trial with co-defendants against whom the evidence is highly probative of guilt, the evidence against the defendant individually does not meet a legal standard of proof.

The Court in *Richardson v. Marsh* pointed out that the almost invariable assumption of the law that jurors follow their instructions is a pragmatic one. 481 U.S. at 207, 211. Moreover, the assumption that jurors follow their jury instructions aids Griffin since the jury in her case was instructed that the defrauding of either of the D.E.A. or the I.R.S. was sufficient for a conviction.

In *Zant v. Stevens*, 462 U.S. 862 (1983) the jury expressly made specific findings; therefore, this Court on review did not actually make application of the *Stromberg* and *Yates* rule, but this Court noted that the *Stromberg* and *Yates* rule would otherwise have been applicable and reiterated that *Cramer* case, a factual sufficiency case, was one of the cases in which the *Stromberg* and *Yates* rule had been applied. *Zant*, 462 U.S. at 881.

This Court in *American Medical Association v. United States*, 317 U.S. 326 (1943) was faced with a claim by the petitioner therein that the conspiracy count of the indictment alleged five separate charges. Petitioner claimed that he was entitled to have the trial court rule upon the "legal sufficiency" of each of these charges. This Court said that it was unnecessary to do so since each of the five was not a separate charge in and of itself but only a step towards the single charge in the count. The steps did not and could not stand alone.

The difference between *American Medical Association* and the instant case is that the two objects charged to Griffin could stand as two separate conspiracy offenses. The steps charged in *American Medical Association* were, in effect, surplusage. They were not necessary to the charge of conspiracy. The government in *American Medical Association* could not prove the step without "more" and have a conviction. The

"more" would have been the agreement itself. The government in Griffin's case had a conviction if it proved either one of the two objects. Each of the two objects had its own purpose and stated a separate conspiracy. The steps in *American Medical Association per se* did not have their own purpose. Each step was not a separate conspiracy. The Court in *American Medical Association* held that the count charged but one conspiracy. Why did the Court proceed through this analysis? Petitioner submits that the Court did so because if there had been five separate charges, the *Stromberg* rule would have been applied.

E. Griffin Was Entitled To Submission Of Her Proposed Special Interrogatories Or A Jury Instruction That Removed The Object Legally, Insufficiently Supported By The Evidence From The Jury's Consideration.

The government agrees, " . . . that special interrogatories can be a valuable tool in cases such as conspiracy or RICO prosecutions where there is doubt as to the legal validity of a particular object or predicate act." Government's Br. at 27. In support of this proposition the government cites *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 751 (1991); *United States v. Coonan*, 837 F. 2d 886 (2d Cir. 1988); and *United States v. Ruggiero*, 726 F. 2d 913 (2d Cir.) *cert. denied*, 469 U.S. 831 (1984).

In *Ruggiero* it appears that if petitioner there had moved the trial court to withdraw the defective predicate act from jury consideration, the government would have agreed with the appellant's contention that the count one RICO conspiracy charge was reversible. In *Ruggiero* it was impossible to determine if the jury picked the impermissible gambling conspiracy charge as one of the two predicate acts out of the thirteen conspiracies charged as predicate acts.

In support of its position the government in *Ruggiero* relied upon *United States v. Natelli*, 527 F. 2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934, 96 S. Ct. 1663, 48 L. Ed.

2d 175 (1976); *United States v. Bonacorsa*, 528 F. 2d 1218 (2d Cir.), *cert. denied*, 426 U.S. 935, 96 S. Ct. 2647, 49 L. Ed. 2d 386 (1976); *United States v. Goldstein*, 168 F. 2d 666 (2d Cir. 1948); *United States v. Mascuch*, 111 F. 2d 602 (2d Cir.), *cert. denied*, 311 U.S. 650, 61 S. Ct. 14, 85 L. Ed. 2d 416 (1940). The Second Circuit said that these cases involved sufficiency of the evidence. The court laid the inference that any requirement that a defendant make a motion to withdraw defective predicate acts in order to later complain of their sufficiency was not applicable in a legal sufficiency case. The court also implied that defective predicate acts in sufficiency of the evidence cases must be withdrawn from jury consideration when the defendant objects to their submission to the jury. Griffin did object in her case. The defective object should have been withdrawn.

Coonan supports Griffin's position before this Court. In *Coonan* the government sought through a mandamus to preclude the district court from submitting special verdicts to the jury. The government sought to ensure a general verdict. The Second Circuit denied the mandamus. It said:

> In other words, what the government seeks to protect is the possibility of its obtaining guilty verdicts through prejudicial spillover from the numerous violent and otherwise criminal acts before it. When examined in this light, the government's position is not simply that it is entitled to a general verdict but that it has a right, enforceable by mandamus, to prevent any and all use of special interrogatories separately from a general verdict no matter how necessary they may be to protection of the defendant's rights.

837 F. 2d at 890. The court's rationale strikes at the very heart of the reason that Griffin needed either to remove the D.E.A. object from the jury's consideration or to submit the special interrogatories to the jury. The reason was to preclude the government from obtaining a guilty verdict on the D.E.A.

object through prejudicial spillover from the numerous criminal drug acts before it.[2]

The court in *Coonan* rejected the government's claim that the government possesses a right to a jury trial coextensive with that possessed by a criminal defendant. The court commented, " . . . the right to a jury trial remains 'principally' for the benefit of the accused. *Singer*, 380 U.S. at 33, 85 S. Ct. at 789 (citing *Patton*, 281 U.S. at 312, 50 S. Ct. at 263)." The court continued, "Moreover, the criminal law's historical preference for general verdicts, much like its traditional distaste for special interrogatories, stems from the unique rights of the criminal defendant." The court finally said, "Most importantly, however, the government, unlike the defendant, may not rightfully seek the benefit of an irrational verdict; although juries may freely temper the rigor of the law, they surely may not enhance it." *Coonan*, 837 F. 2d at 891.

The only learning provided by *Aguilar* is that a counsel may waive the issue of a special verdict if counsel fails to request it. *Aguilar*, 883 F. 2d at 691. The court reminded that this rule was a requirement grounded in traditional efficiency and fairness. The *Aguilar* case itself actually revolved around the possibility of a non-unanimous verdict.

The government in its brief states; "The government often proposes the use of special interrogatories in such cases in order to avoid the need for a retrial if one predicate act or

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[2] Commentators have noted the efficacy of special verdicts in eliminating prejudice. Special interrogatories share that efficacy. "Special verdicts minimize the jury's prejudice and sympathy in most cases because it is often not readily apparent which side the jury's findings will favor."

"Special verdicts impose a logical structure on the jurors' responses, requiring them to think with their heads rather than with their hearts. Focusing the jury on the factual issues rather than on who wins confines the jury to its proper role as an impartial, rational finder of fact and reduces prejudicial distractions." Faulkner, *Using The Special Verdict To Manage Complex Cases and Avoid Compromise Verdicts*, 21 Arizona State Law Review 297, 314 (1989).

object turns out to have a legal flaw". Government's Br. at 28. The government cites as examples *United States v. Boffa*, 688 F. 2d 919 (3d Cir. 1982), *cert. denied*, 465 U.S. 1066 (1984); *United States v. Palmeri*, 630 F. 2d 192, 202-203 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981); *United States v. O'Looney*, 544 F. 2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 123 (1976).

In *O'Looney* the trial court gave a special interrogatory because the jury wrote a note stating that it was definite on one object but not on the other. Obviously the jury felt that the evidence was sufficient on one but not on the other. *O'Looney*, 544 F. 2d at 391, n.4. With this special verdict the jury found guilt on one object but not on the other. *O'Looney*, 544 F. 2d at 392. The court used the special verdict with agreement by the defense to determine upon which there was a finding of guilty and upon which there was a finding of not guilty. Griffin should have been allowed her special interrogatories so that the jury could tell on which object there was a finding of guilty.

In *Palmeri*, the court thought it was a proper use of special interrogatories to employ them " . . . to decrease the likelihood of juror confusion and to aid the jury in concentrating on each specific defendant, and the charges against him, rather than incriminating one potentially innocent defendant solely on the basis of his association with the others." This was the aim of Griffin's special interrogatories in her case.

In *Boffa* the Third Circuit in reversing convictions that relied on legally insufficient acts cited as precedent one case that reversed a conviction because of an object legally, insufficiently supported by the evidence and one case that reversed because of an object that failed to state a crime. See respectively *United States v. Dansker*, 537 F. 2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S. Ct. 732, 50 L. Ed. 2d 748 (1977); *United States v. Kavazanjian*, 623 F. 2d 730, 739 (1st Cir. 1980).

The government in its brief cites the 1953 case of *Stein v. New York*, 346 U.S. 156 (1953) for the general statement that

this Court and others have discouraged routine use of the practice of submitting special interrogatories. Government Br. at 28. But *Stein's* facts do not give rise to the concern that arises in multiple-predicate act or multiple-object charges. The *Stromberg-Yates-Cramer-Haupt* rule grew from that concern. More importantly, *Stein* predates the substantial predilection of prosecutors to bring multiple-object conspiracy and multiple-predicate act RICO indictments. It is in these types of charges that undisclosed jury choices may easily do injustice or cause costly re-trials. Simple and appropriate special interrogatories, especially when requested by the defendant, disclose critical jury choices, preclude prejudicial spillover, preclude conviction on legally or factually insufficient objects or predicate acts and preclude the need to retry these cases.

F. Submission Of The Special Interrogatories In Griffin's Case Would Not Have Resulted In Jury Confusion But At Most Would Have Properly Drawn Attention To The Fact That Griffin Could Not Be Convicted By Reason Of The D.E.A. Object.

The government in its brief warns that submission of the special interrogatory, " . . . especially if submitted to the jury prior to the general verdict, can sometimes result in jury confusion and may unduly focus attention on a particular charge or a particular defendant, as this case illustrates." Government's Br. at 29. The removal of the D.E.A. object with respect to Griffin or submission of Griffin's special interrogatories would not have caused juror confusion; on the contrary, if the jurors were to be confused by submission of two simple special interrogatories in Griffin's case, they definitely needed to have either the D.E.A. object removed from their consideration or the court's direction to separately consider each of the two objects.

Any confusion that this jury may have suffered from arose from the government's submission of a large volume of evidence of Griffin's acquaintanceship with large scale drug

dealers and from the government prosecutors' opening statements and closing arguments, both of which advised the jury that Griffin was still charged with conspiracy to defraud the D.E.A. and set out what elements were needed to convict her of it. In closing argument the government confirmed that she was charged with conspiracy to defraud the D.E.A. The government advised the jury how the element had to be met. In rebuttal the government told the jury that she was guilty of conspiracy to defraud the D.E.A. by reason of what she saw, implying that she saw controlled substances. The government prosecutor's weak, last minute, objection induced disclaimer did not overcome the government's previous lengthy insistence that Griffin be convicted on the conspiracy to defraud the D.E.A. Moreover, the trial court's instructions invited the jury to deliberate on the D.E.A. object and to find guilt upon it as the solo basis for conviction on Count 20.

The government argues against proper jury instructions or special interrogatories because such would have given Griffin a special status and would have the jurors speculating why she alone had a special interrogatory on one count. Government Br. at 29. If the jurors were subject to such wonderment by submission of a special interrogatory, they were in absolute, dire need of special interrogatories in the case because Griffin had a special status and if the jury did not realize it – and evidently the government agrees with Griffin that they did not realize it – the jury would have treated Griffin just like co-defendants McNulty or Beverly by possibly finding her guilty on the D.E.A. object alone.

G. The Issue Of Whether Or Not The Prosecutor's Disclaimer Of Purpose As Stated In Rebuttal Argument Assures That The Jury Did Not Decide Guilt Upon The D.E.A. Object Should Have No Effect On This Court's Decision To Continue To Apply The *Stromberg* And *Yates* Rule To Objects Legally, Insufficiently Supported By The Evidence.

The government says that the jury could not have been misled about the government's position regarding the D.E.A. object.

Government's Br. at 30. Such an argument is not relevant to a determination of what rule should apply in multiple-object conspiracies or multiple-predicate act RICO charges. If the Court is certain that this jury could not possibly have reached determination on the D.E.A. object after the government prosecutor's disclaimer of position, then no reversal would lie even if the *Stromberg* and *Yates* rule applied. For reasons previously set out in this argument, Griffin strongly suggests that the government's manner of prosecution allows no such certainty. Additionally, the Seventh Circuit decided Griffin's case on the basis of *Turner* and " . . . the distinction between legal and factually unsupported objects in multi-object conspirarcy cases." *United States v Beverly*, 699 F. 2d 337, 365 (1990); J.A. 117.

Meanwhile the trial court submitted instructions on the law to the jury that told the jury that it was proper to convict by reason of the D.E.A. object alone. Griffin was entitled to the protection of the law. The government vigorously resisted that protection. The district court did not afford her that protection. Finally, to quote the government's brief, "Our judicial system presumes that jurors follow the trial judge's instructions on the law. See *Richardson v. Marsh*, 481 U.S. 200, 206-207." Government's Br. at 20. Should it not be presumed the jury followed the trial court's misinstruction here?

H. The *Stromberg-Yates* Rule Applies To Objects That Do Not Meet The Standards Of The Law.

The possibility that a person be convicted on a charge where the law says that he may not be convicted is anathema to our sense of justice. No waiver rule should ever be countenanced in such situations. But even more, a criminal defendant who objects in advance to the submission of an insufficient object to a jury for its consideration of guilt or innocence in a blind, multiple-object charge should without question have the benefit and protection of the reasoned *Stromberg-Cramer-Haupt-Yates* line of cases. If the defendant

waives the historical reasons given for reluctance to submit special interrogatories in criminal cases and seeks their submission, then there is no rational reason not to afford that defendant the assurance that the jury is not carried away by prejudice to find guilt on an object legally, insufficiently supported by the evidence. The *Stromberg-Cramer-Haupt-Yates* rule is one of reason and elucidation. The government's proposed rule is one of guess, speculation and obfuscation. Reason and light ought to prevail.

CONCLUSION

The judgment of the Court of Appeals ought to be reversed and this case remanded to the district court for a new trial.

Respectfully submitted,

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